JUDGMENT OF THE COURT
16 FEBRUARY 1982 [1]

Procureur de la République and Others v Guy Vedel and Others (reference for a preliminary ruling from the Tribunal Correctionnel, Montpellier)

(Aperitifs — Compatibility of national legislation)

Case 204/80

Agriculture — wine-based aperitifs — Community definition — None — Power of Member States to enact rules as to quality — Requirement of minimum proportion of alcohol — Permissibility — Conditions

(Council Regulations No 816/70, Annex II, point 10, and No 337/79, Annex II, point 11)

The appellation "wine-based aperitifs" is not at present governed by Community regulations which exclude the application of the national legislation of the Member States.

Since there are no applicable Community regulations the Member States continue to have the power to define the standards applicable to the manufacture and marketing of national products called wine-based aperitifs. Therefore a Member State may not be prevented from subjecting the manufacturer of wine-based aperitifs to special quality rules, depending on the characteristics of that kind of beverage. If a requirement of a minimum proportion of alcohol is within the Community limits, it meets that criterion of quality.

In Case 204/80

REFERENCE to the Court under Article 177 of the EEC Treaty by the Third Chamber of the Tribunal Correctionnel [division of the Regional Court having jurisdiction in criminal cases], Montpellier, for a preliminary ruling in the proceedings pending before that court between

PROCUREUR DE LA RÉPUBLIQUE [Public Prosecutor],

FÉDÉRATION NATIONALE DES PRODUCTEURS DE VINS DE TABLE ET VINS DE PAYS [National Federation of Producers of Table Wines and Local Wines],

ADMINISTRATION DES IMPÔTS [Revenue Authorities]

1 — Language of the Case: French.

and

GUY VEDEL,

JACQUES VEDEL,

HENRI LEJEUNE

on the question whether national legislation laying down the minimum percentage and alcoholic strength of wine required for a product to be called a "wine-based aperitif" is compatible with the common organization of the market in wine,

THE COURT

composed of: J. Mertens de Wilmars, President, G. Bosco, A. Touffait, O. Due (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans, U. Everling, A. Chloros and F. Grévisse, Judges,

Advocate General: S. Rozès
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community may be summarized as follows:

I — Facts and written procedure

1. French legislation on wine-based aperitifs provides that:

"It shall be prohibited to sell or offer for sale, to be in possession of or transport with a view to sale under the description vermouth or any other description commonly reserved for wine-based aperitifs, beverages with an alcoholic strength exceeding 23° or containing less than 80 % of liqueur wine, grape must or genuine ordinary wine of merchantable quality and having an alcoholic strength of not less than 10°".

(Article 5 of the Decree of 31 January 1930 implementing the Law of 1 August 1905 on trade in liqueur wines, vermouths and wine-based aperitifs, Journal Officiel de la République Française, 1 February 1930).

Therefore the conditions which must be fulfilled for a product to be lawfully marketed in France under the description of wine-based aperitif are:

(a) an alcoholic strength exceeding 23°, or

(b) a content of at least 80 % of liqueur wine, grape must, or

(c) genuine ordinary wine of merchantable quality having an alcoholic strength of not less than 10°.

Fraudulent practices, such as the marketing of products which do not comply with Article 5, or the addition of colouring or sweetening agents and so forth (described in Article 7 of the Decree) are prohibited by Article 1 of the Law of 1 August 1905 and subject to criminal proceedings.

2. Guy and Jacques Vedel and Henri Lejeune were prosecuted for fraud for offering for sale under the appellation of wine-based aperitif an aperitif, St-Raphaël, which had not been made in accordance with the requirements of Article 5 of the Decree of 31 January 1930. They were summoned before the Tribunal Correctionnel, Montpellier, charged with the following offences:

Jacques Vedel

During 1975 and until 30 June 1976 at Sète preparing and marketing under the appellation of wine-based aperitif at least 221 327.34 hectolitres of aperitif not containing the minimum 80 % of wine, 218 715.67 hectolitres of that quantity having moreover been made with wine having an alcoholic strength of less than 10°;

and as a result deceiving the contracting party as to the nature and basic qualities of the product;

Guy Vedel

Charged with the same offences committed in the period from 1 July 1976 to 31 May 1978 on taking over duty from Jacques Vedel as warehouse manager of Saint-Raphaël SA;

Henri Lejeune

Charged with the same offences as managing director of that company and liable under civil law.

The Administration des Impôts, the intervener in the main proceedings, and the Fédération Nationale des Producteurs de Vins de Table, which is a civil party to the criminal proceedings, have also applied for confiscation of the spirits seized, the estimated value of which is FF 202 721 210. They also ask the national court to order the two accused and the managing director of the company jointly and severally to pay 246 fines of FF 100 to FF 5 000 each and a proportional penalty of between FF 119 079 296.76 and FF 357 237 890.28 as provided for in the Code Général des Impôts [General Tax Code].

3. As the file on the case shows, the product at issue was made in three successive stages:

Alcohol is added to an ordinary wine having a natural alcoholic strength of 8.5° using on average 75.57 hectolitres of such wine to obtain 81 hectolitres of fortified wine at 15.1°;

More alcohol is added as well as sugar and water to that fortified wine to obtain 90.46 hectolitres, sugar-based, at 15°;

Lastly, alcohol is added, with colouring agents, aromatic extracts and spirits, to that base to obtain 100 hectolitres of aperitif at 16° to 18°.

4. Without denying the facts alleged against them, the accused submitted that the 1930 Decree is no longer applicable because it is incompatible with the relevant provisions of Community law. They claim that the minimum alcoholic strength required by the Community regulations is only 8.5° and not 10° and that the proportion of 80 % of wine required by the French decree is not a valid requirement either because, since the same Community regulations allow wines of 8.5° to be used to make products falling within heading 22.06 of the Common Customs Tariff, they have rendered Article 5 of the Decree of 31 January 1930 entirely inapplicable.

5. Faced with a question of Community law the Tribunal Correctionnel, Montpellier, stayed the proceedings and by order of 29 September 1980 registered at the Court of Justice on 20 October 1980 submitted the following questions under Article 177 of the EEC Treaty:

"1. May the description 'wine-based aperitif' be regarded as covered by an EEC regulation precluding the application of national law in so far as heading 22.06 of the Common Customs Tariff refers to products defined as 'vermouths, and other wines of fresh grapes flavoured with aromatic extracts with an alcoholic strength not exceeding 22°' and, if the answer is in the affirmative, must such a product have characteristics other than those specified in the said definition?

2. If the answer to Question 1 is in the negative, has Regulation (EEC) No 816/70 of the Council of 28 April 1970, by defining, in point 11 of Annex II thereto, table wine to which it is lawful to add alcohol for the purpose of producing products falling within the above-mentioned tariff heading 22.06 as a wine which must have natural alcoholic strength of not less than 8.5°, when Article 5 of the Decree of 31 January 1930 prohibits in France the possession, transportation and sale under the appellation of wine-based aperitifs or any other name reserved for that purpose of beverages containing less than 80 % of genuine ordinary wine of merchantable quality having a natural alcoholic strength of not less than 10°, made this latter requirement of 10° inapplicable and replaced it with a strength of 8.5°?

3. If the answer to Question 2 is in the affirmative, by making one of the two essential conditions laid down by the above-mentioned Article 5 inapplicable, do the Community regulations mean that the other condition requiring vermouths and similar products to contain 80 % wine may no longer be imposed separately, and finally has Article 5 of the Decree of 31 January 1930 become inapplicable in its entirety?"

6. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community observations were lodged on 18 December 1980 by André Lénard for Guy and Jacques Vedel and on 19 December 1980 by the Commission of the European Communities, represented by its Legal Adviser, Jean-Claude Séché.

7. On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry. It did however ask the French Government to reply in writing to two questions on the reason for the maintenance of the rule in the French decree in question requiring a minimum alcoholic strength of 10° and the Commission to submit two documents cited in the observations of the parties. The requests were complied with within the time allowed. The Court also expressed its wish that the French Government be represented at the hearing and that its representative be accompanied by a specialist in wines.

II — Written observations submitted to the Court under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

1. In their observations Guy and Jacques Vedel, the accused in the main proceedings, maintain their argument that the French decree of 1930 under which they are being prosecuted no longer complies with Community law.

Question 1

The accused contend that wine-based aperitifs fall within heading 22.06 of the Common Customs Tariff although they are not expressly named in that heading and that they do so for two reasons. First, because of their customary appellation as "vermouth" which appears in tariff subheading 22.06; they claim that the French legislation (and particularly the decree at issue) recognizes that wine-based aperitif is a genus of which vermouth is only one kind and a name commonly used for wine-based aperitifs. Secondly, because of their definition on the basis of content, which definition is that of a product made from flavoured wine. They point out moreover that even the Public Prosecutor's Office has never cast any doubt on whether vermouths and wine-based aperitifs fall within tariff heading 22.06.

However, they deny that, simply because they are classified in heading 22.06, wine-based aperitifs are subject to Community regulations, as the first question submitted by the Tribunal Correctionnel appears to imply. They contend that a customs tariff is a fiscal instrument which sets out, according to their characteristics, the products on which customs duty is levied. Therefore the tariff may not by its nature regulate the method by which the product which it taxes is made.

Furthermore, the Common Customs Tariff, and consequently heading 22.06, was adopted well before the Community's first overt action on wine-based aperitifs which they say did not take place until 1971 when Regulation No 1598 was adopted.

They also say that there are no clear-cut Community regulations by way of legal instruments which might form a body of rules regulating wine-based aperitifs and their manufacture. In this connection they quote a passage from a letter of 21 November 1980 sent by Mr Burke, a Commissioner, to the President of the Committee of Professional Wine-Growers in the EEC. The passage runs:

"The Commission sees the urgent need to enact rules at Community level on, amongst other things, the composition and manufacturing characteristics of spirits and flavoured wines (within the

meaning of heading 22.06 of the Common Customs Tariff) given the likelihood that the differences existing between the national provisions might impede free movement and create unequal conditions of competition".

The statement of reasons in the preamble to Regulation No 351/79 also shows that the Community intended to adopt provisions supplementing or harmonizing definitions of products falling within heading 22.06.

They claim moreover that there are simply exemptions introduced by a regulation which, pending the enactment of the regulations promised on wine-based aperitifs, nevertheless preclude criminal proceedings against the Saint-Raphaël company.

Question 2

Guy and Jacques Vedel submit that the Community regulations, which they claim expressly permit the use of table wine at 8.5°, have rendered inapplicable the French Decree of 1930, which prohibited the use of wine of less than 10°

They point out that besides two other conditions, Article 5 of the 1930 Decree requires that a wine-based aperitif should be prepared in particular from a genuine ordinary wine of merchantable quality having an alcoholic strength of not less than 10°.

They claim however that the Community regulations allow by way of exception an alcoholic strength of 8.5° for table wines. In their analysis the Community regulations have come through the following stages.

The Community began by prohibiting in Regulation No 816/70 the addition of alcohol to all the products which it covered.

Modifications of that prohibition, which was gradually lifted, were made:

First by Regulation No 1093/70 which allowed alcohol to be added to table wines exported to certain countries, in particular

"... to prevent climatic conditions or transport from affecting the quality of the exported wines".

Then, by a new regulation on wine-based aperitifs, No 1598/71, enacted on the ground that

"the preparation of products falling within heading No 22.06 of the Common Customs Tariff requires the addition of alcohol to some of the products listed in Article 1 (2) of Regulation (EEC) No 816/70; whereas in these cases such preparation is significant enough to justify derogation from the prohibition".

Hence Article 1 thereof which, by extending Article 1 of Regulation (EEC) No 1093/70, permits alcohol to be added in particular to

"1. (c) (ii) Tables wines ... intended for the preparation of products falling within heading No 22.06 of the Common Customs Tariff".

They point out that this regulation was confirmed by two subsequent regulations, No 1876/71 and No 680/75, and that table wines were defined by the Community regulations in Annex II to the consolidated Regulation No 337/79 as wines having an alcoholic strength of 8.5°.

Question 3

The accused in the main proceedings recall that this question seeks to ascertain

whether, should Question 2 be answered to the effect that the alcoholic strength of 10° required by national legislation has been replaced with an alcoholic strength of 8.5° by the Community regulations, it follows that the other requirement of the national legislation, namely that wine-based aperitifs should contain a proportion of 80 % of "liqueur wine, grape must or genuine ordinary wine of merchantable quality", has been set aside.

They explain what is meant under national and Community law by "genuine" wine of "merchantable quality". They conclude that in French law as well as in Community law wine is the product:

"obtained exclusively from the total or partial alcoholic fermentation of fresh grapes . . ." (point 8 of Annex II to Regulation No 337/79).

Consequently wine is not genuine wine unless it is pure.

Nor is it genuine if alcohol has been added to it after it has fermented.

The addition of more alcohol, even alcohol made from wine, to a wine prevents its being described as wine under Community regulations and it is not possible to say that wine is genuine wine if it does not consist exclusively of the product obtained from the fermentation of fresh grapes.

But they claim that, unlike the Decree of 31 January 1930, the Community regulations allow table wine to which alcohol has been added to be used to make a wine-based aperitif.

Therefore there can be no question in future of requiring a wine-based aperitif to contain genuine wine; which leads them to believe that *a fortiori* a wine-based aperitif may not in future be required to contain 80 % by volume of so-called genuine wine because genuine wine is no longer required at all.

Since, therefore, the two basic requirements of Article 5 of the 1930 Decree have been set aside by the Community regulations, they submit that the Court's answer to the Tribunal Correctionnel, Montpellier, should be that Article 5 is entirely inapplicable.

2. After giving a brief summary of the facts which led to this reference from the Tribunal Correctionnel, Montpellier, and of the arguments of the accused, the *Commission of the European Communities* basically makes the following observations as to the law:

Question 1

The Commission states that wine-based aperitifs fall within heading 22.06 of the Common Customs Tariff and can be distinguished from other beverages falling within Chapter 22 of the Common Customs Tariff. As a result of that classification the duties fixed in the Common Customs Tariff are imposed on those products when they are imported into the Community from non-member countries but that does not mean that they are governed by the common organization of the market in wine. The Commission draws that conclusion from the fact that Council Regulation No 337/79 of 5 February 1979 does not list the products falling within heading 22.06 and Article 1 (2) thereof does not mention them at all whereas for example, it expressly refers to those falling within heading 22.05.

Consequently, the Commission observes, Annex II referred to in Article 1 (4) (b) does not give any definition of wine-based aperitifs whereas it contains, for example, a definition of table wine (point 11) and liqueur wine (point 12).

The Commission goes on to point out that Council Regulation No 351/79 of 5 February 1979 concerning the addition of alcohol to products in the wine sector mentions vermouths and wine-based aperitifs but does not define them. It observes that in principle Article 42 (1) of Regulation No 337/79 prohibits the addition of alcohol to the products covered by that regulation, subject to Article 42 (2) which permits derogations. It points out that the aim of Regulation No 351/79 is precisely to make provision for such derogations and that Article 1 (3) thereof permits the addition of alcohol to certain products, including table wine (Article 1 (3) (d)) intended for the preparation of products falling within heading No 22.06. This continues to make it possible to produce flavoured wines in the Community such as those at issue in this case.

It claims that this is unlikely to undermine the conclusion that there is no Community definition of wine-based aperitifs; quite the reverse, because Regulation No 351/79 is only concerned with the addition of alcohol to the products referred to in Article 1 (2) of Regulation No 337/79, that is to say those governed by the common organization and themselves defined in Annex II.

Those observations lead the Commission to conclude that the first question should be answered in the negative with the result that the national legislation continues to apply as regards the appellation "wine-based aperitif".

Question 2

The Commission contends that the addition of alcohol, within the meaning of Regulation No 351/79, to products governed by the common organization is permissible only in compliance with the Community definitions of the products in question. Where table wine is concerned, it is essential that the definition thereof given at point 11 of Annex II to Regulation No 337/79 is complied with.

As regards the alcoholic strength of table wine, it should not be less than 8.5° and not more than 15° or 17°, as the case may be.

A national definition requiring table wine of less than 8.5° or more than 15° or 17° to be used in the making of wine-based aperitifs would therefore be contrary to Community law.

Where, however, the national legislation is within the limits set down in point 11, as in this case, the Commission believes that it still complies with the Community regulations.

Failing therefore a Community definition of wine-based aperitifs, a definition by national law of such products which simply requires a minimum alcoholic strength for table wine and complies with the Community definition of table wine is compatible with Community law.

Question 3

The Commission believes moreover that the absence of any Community definition of wine-based aperitifs also leaves Member States free to prescribe the minimum percentage of wine necessary before an aperitif may purport to be "wine-based".

Secondly, the Commission does not believe that there is any connection between the two conditions requiring the wine used to have a minimum alcoholic strength and a minimum percentage of 80 % which, should one of them be compatible with Community law, would make the other condition incompatible too.

It does believe however that because it is possible under Community law to use table wine of 8.5° there is a technical justification for requiring 80 % wine so

as to ensure that a sufficient proportion of the alcohol obtained does come from the wine used. The alcohol content of an aperitif of 18° composed, for example, of 50 % wine of 8.5° is in the end due much more to the alcohol added than to the wine which it contains.

Therefore the answer to this question should be that the national legislation which requires a minimum wine content for wine-based aperitifs is compatible with Community law.

III — Answers of the French Government and the Commission to the questions asked by the Court.

1. In its answer to the questions asked by the Court, the French Government basically argues that the national legislation on wine-based aperitifs remains valid in the absence of relevant Community regulations.

It does admit however that a result of Regulation No 1093/70 is that the manufacture of products falling within heading 22.06 of the Common Customs Tariff is affected because the regulation determines the raw materials which may be used to make them.

The French Government states that the Decree of 31 January 1930 was amended by the repeal of Articles 1 and 4 simply in order to take account of the effect of Regulation No 816/70 on the definition of liqueur wines; the articles concerning vermouths and wine-based aperitifs, however, were not affected.

The French Government also observes, that as far as vermouths and wine-based aperitifs are concerned, Article 5 of the Decree of 31 January 1930 therefore lays down a minimum alcoholic strength by volume only for the wines used (genuine, sound, ordinary wines of merchantable quality) whereas that rule does not apply to liqueur wines. The French Government stresses that the fact that liqueur wines are not enriched through the addition of saccharose and that they must be of sufficient quality to be suitable for consumption in their actual state, particularly without flavouring, was a guarantee of the quality of those products which moreover may be used to prepare vermouths and wine-based aperitifs.

The French Government points out that the effect of the new definition of liqueur wines was first to fix the minimum strength by volume of the wine or must used to make them at 12 % in the knowledge that in future that degree of alcoholic strength could be attained under the Community regulations through enrichment, in some wine-growing areas, by the addition of saccharose, whereas under previous national law, although no minimum alcoholic strength was fixed for wine products used to make liqueur wines, enrichment through the addition of saccharose was nevertheless prohibited.

Furthermore, the limit of actual alcoholic strength (18°) of vermouths and wine-based aperitifs and the minimum alcoholic strength by volume of liqueur wines (15°) means that as little liqueur wine as possible has to be used to obtain sufficient vinosity.

The French Government observes that in the present case the French undertaking in question has made its products as it has in the past without taking account of the implications of the wine regulations, particularly those concerning liqueur wines.

The question also arises whether Regulation (EEC) No 1093/70 applies to the manufacture of products falling within heading 22.06 of the Common Customs Tariff and consequently whether the alcoholic strength by volume of the must or wine used to make products which used to be called "liqueur wines" should

be at least equal to that of the products covered by that regulation (musts, partially fermented grape musts, wines and quality wines psr) or whether, however, the reference to "liqueur wine" in Article 5 of the Decree of 31 January 1930 means that the Community definition of that beverage, which requires the minimum alcoholic strength by volume to be 8.5 % or 9 %, depending on the area from which the wine comes, must be complied with.

The French Government considers that the rule requiring a minimum alcoholic strength of 10° by volume should be retained for the preparation of vermouths and wine-based aperitifs made straight from wine.

The French Government therefore replies as follows to the questions put to it by the Court of Justice to ascertain the reason for the introduction and retention of the requirement in the French Decree of 31 January 1930 that wines used to make wine-based aperitifs must have a minimum alcoholic strength of 10°.

(a) The French Decree of 31 January 1930, which was kept in force after the Decree of 21 April 1972 came into effect, fixed the minimum alcoholic strength of "ordinary wines" used to make vermouths and wine-based aperitifs at 10° in order to make it necessary to select base wines according to their quality, seeing that alcoholic strength was the analysis factor which, in conjunction with organoleptic tests, enabled an adequate quality to be guaranteed.

(b) Since legislation on vermouths and wine-based aperitifs has not been harmonized at Community level it did not appear necessary to amend the 10° rule when no provision of Community law appears to prevent its being maintained, seeing that that rule is within the minimum and maximum limits of alcoholic strength of products which may be used under Regulation (EEC) No 1093/70, to make wine-based aperitifs.

2. At the Court's request the Commission produced a draft proposal of 16 February 1981 for a Council regulation laying down general rules on the definition, description and presentation of spirituous beverages and of vermouths and of other wines of fresh grapes flavoured with aromatic extracts. The Commission stated however that the draft has not yet been examined by all its departments and that it covers spirituous beverages and aromatized wines in the same regulation. According to the draft, the term "aromatized wine" means "a beverage ... consisting of wine or must, with or without added ethyl alcohol of agricultural origin". The draft regulation also provides that aromatized wines must have a minimum total alcoholic strength of 10 % by volume and wine or must present in a proportion of not less than 75 %.

IV — Oral procedure

At the hearing on 7 July 1981 oral argument was presented by the following: A. Lénard, Advocate, for the defendant in the main proceedings, A. Carnelutti, a Foreign Affairs Secretary, assisted by M. Tinloc, Inspector General of the Office for the Suppression of Fraud, for the French

Government; and by J.-C. Séché, acting as Agent, for the Commission of the European Communities.

The Advocate General delivered his opinion at the sitting on 20 October 1981.

Decision

1 By order of 29 September 1980 which was received at the Court on 20 October 1980 the Tribunal Correctionnel (division of the Regional Court having jurisdiction in criminal cases], Montpellier, referred three questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty to enable the Tribunal Correctionnel to decide whether provisions of French legislation laying down minimum requirements as to the percentage and alcoholic strength of wine contained in products called "wine-based aperitifs" falling within tariff heading 22.06 are compatible with the common organization of the market in wine.

2 Those questions were raised in the context of criminal proceedings brought against the managing director and the warehouse managers of a company for making and selling under the description of wine-based aperitif an aperitif, St-Raphaël, which was not made in accordance with the quality requirements contained in Article 5 of the French Decree of 31 January 1930.

3 That article provides that "it shall be prohibited to sell or offer for sale, to be in possession of or transport with a view to sale under the description vermouth or any other description commonly reserved for wine-based aperitifs, beverages with an alcoholic strength exceeding 23° or containing less than 80 % of liqueur wine, grape must or genuine ordinary wine of merchantable quality and having an alcoholic strength of not less than 10°".

4 The accused were prosecuted for making and marketing during 1975 and until 31 May 1978 under the description of wine-based aperitif at least 221 327.34 hectolitres of aperitif not containing the minimum percentage of 80 % of wine and of which moreover 218 715.67 hectolitres had been made using wine with a strength of less than 10°.

5 The accused claimed that the French Decree of 31 January 1930 was not applicable on the ground that it was incompatible with Community law because the minimum alcohol content which the Community regulations require table wine contained in wine-based aperitifs to have is 8.5° instead of 10° as required by the French legislation.

6 They claim that Article 5 of the Decree of 31 January 1930 has therefore become inapplicable in its entirety because the fact that the rule which it contains on the alcoholic strength of table wine used in wine-based aperitifs is incompatible with Community regulations makes the rule as to the minimum percentage of 80% incompatible as well.

7 In order to be able to decide whether the national provisions are compatible with Community law the national court referred the following three questions to the Court:

"1. May the description 'wine-based aperitif' be regarded as covered by an EEC regulation precluding the application of national law in so far as heading 22.06 of the Common Customs Tariff refers to products defined as 'vermouths, and other wines of fresh grapes flavoured with aromatic extracts with an alcoholic strength not exceeding 22°' and if the answer is in the affirmative, must such a product have characteristics other than those specified in the said definition?

2. If the answer to Question 1 is in the negative, has Regulation (EEC) No 816/70 of the Council of 28 April 1970, by defining, in point 11 of Annex II thereto, table wine to which it is lawful to add alcohol for the purpose of producing products falling within the above-mentioned tariff heading 22.06 as a wine which must have natural alcoholic strength of not less than 8.5°, when Article 5 of the Decree of 31 January 1930 prohibits in France the possession, transportation and sale under the appellation of wine-based aperitifs or any other name reserved for that purpose of beverages containing less than 80 % of genuine ordinary wine of merchantable quality having a natural alcoholic strength of not less than 10°, made this latter requirement of 10° inapplicable and replaced it with a strength of 8.5°?

3. If the answer to Question 2 is in the affirmative, by making one of the two essential conditions laid down by the above-mentioned Article 5

inapplicable, do the Community regulations mean that the other condition requiring vermouths and similar products to contain 80 % wine may no longer be imposed separately, and finally has Article 5 of the Decree of 31 January 1930 become inapplicable in its entirety?"

Question 1

8 It must be observed that Regulation (EEC) No 816/70 of the Council of 28 April 1970 laying down additional provisions for the common organization of the market in wine, which was cited before the national court and is incorporated in Council Regulation (EEC) No 337/79 of 5 February 1979 on the common organization of the market in wine, does not mention the products set out in heading 22.06 of the Common Customs Tariff within which wine-based aperitifs fall. As a result the products in question are not defined in Annex II referred to in Article 1 (4) (b) of Regulation No 337/79.

9 Nor is such a definition to be read into the Community regulations because of the fact that at the time of the events in question products falling within heading 22.06 of the Common Customs Tariff were referred to in Article 1 (3) of Regulation (EEC) No 1876/74 of the Council of 15 July 1974 concerning the addition of alcohol to products in the wine sector, as amended by Regulation (EEC) No 680/75 of the Council of 4 March 1975. At the present time this is also the case under Article 1 (3) of Council Regulation (EEC) No 351/79 of 5 February 1979 concerning the addition of alcohol to products in the wine sector. The aim of that regulation is to make derogations from Article 42 (1) of Council Regulation (EEC) No 337/79 and thus to allow the addition of alcohol to certain products to be used to make products falling within tariff heading 22.06 which include table wine.

10 It follows that wine-based aperitifs are not at present governed by Community regulations. This has been accepted by all the interested parties who have submitted observations to the Court and is moreover shown by the draft proposal for a Council regulation drawn up by the Commission on 16 February 1981 laying down general rules on the definition, description and presentation of spirituous beverages and of vermouths and of other wines of fresh grapes flavoured with aromatic extracts.

11 The fact that wine-based aperitifs belong to heading 22.06 of the Common Customs Tariff can be no substitute for such regulations. The purpose of the Common Customs Tariff is to classify goods so that customs duties can be collected and not to regulate the methods by which the products which it taxes are made.

12 The answer to the first question put to the Court must therefore be that the appellation "wine-based aperitifs" is not at present governed by Community regulations which exclude the application of the national legislation of the Member States.

Question 2

13 The accused contend that in so far as they exist the Community regulations allow table wine of an alcoholic strength of 8.5° to be used to make wine-based aperitifs, table wine being defined in Annex II to Regulation (EEC) No 816/70 of the Council and now by Annex II to Regulation No 337/79 as wine which has an alcoholic strength of not less than 8.5° and not more than 15° or 17°. They claim that this has the effect of rendering inapplicable Article 5 of the Decree of 31 January 1930 prohibiting the use of a wine of an alcoholic strength of less than 10° for making wine-based aperitifs.

14 According to the French Government, the fact that wine-based aperitifs are not regulated at Community level means that Article 5 of the French Decree of 31 January 1930 on the making of wine-based aperitifs, which is intended to maintain the necessary quality standards for national products continues to apply. The French Government has explained that the minimum proportion of alcohol in base wines was fixed at 10° in order to ensure that since it is enriched with distilled alcohol the product sold as "wine-based aperitif" should contain a sufficiently representative proportion of alcohol derived from the natural fermentation of grapes.

15 The Commission submits that the addition of alcohol within the meaning of Regulation No 351/79 to products governed by the common organization may take place only in compliance with the Community definitions of those products and, in the case of table wine, with the definition given at point 11 of Annex II Regulation No 337/79 which allows a minimum alcoholic strength of 8.5° and a maximum of 15° or 17°, as the case may be. According to the Commission, it follows if a rule of national law relating to

table wine used to make wine-based aperitifs requires wine of an alcoholic strength of less than 8.5° or more than 15° or 17° to be used, that rule is not compatible with Community law.

16 Since there are no applicable Community regulations the Member States continue to have the power to define the standards applicable to the manufacture and marketing of national products called wine-based aperitifs. Therefore a Member State may not be prevented from subjecting the manufacturer of wine-based aperitifs to special quality rules, depending on the characteristics of that kind of beverage. If a requirement of a minimum proportion of alcohol like that contained in Article 5 of the French Decree of 31 January 1930 is within the Community limits, it meets that criterion of quality.

17 It does not appear that the power which Member States therefore have is restricted by the provisions of Community law governing the marketing of products used to make wine-based aperitifs and, in this case, table wine.

18 Point 10 of Annex II to Regulation No 816/70 of the Council and now point 11 of Council Regulation No 337/79 limit the alcoholic strength of table wine to between 8.5° at the minimum and 15° or 17° at the maximum, as the case may be; however, that provision deals only with wines intended for direct consumption in their present state which may therefore be imported and may circulate freely in the Community, although under the relevant national legislation they may not be used to make wine-based aperitifs if their alcoholic strength is not that fixed by that legislation.

19 The answer to the second question must therefore be that Regulation No 816/70 does not preclude national legislation on the preparation of wine-based aperitifs from containing a provision such as that referred to by the national court.

Question 3

20 In view of the answers given to Questions 1 and 2 consideration of Question 3 is no longer necessary for the national court to be able to decide the case before it.

Costs

21 The costs incurred by the French Government and the Commission of the European Communities which have submitted observations to the Court are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions submitted to it by the Tribunal Correctionnel, Montpellier, by order dated 29 September 1980 hereby rules:

1. **The appellation "wine-based aperitifs" is not at present governed by Community regulations which exclude the application of the national legislation of the Member States.**

2. **Regulation No 816/70 of the Council of 28 April 1970 laying down additional provisions for the common organization of the market in wine does not preclude national legislation on the preparation of wine-based aperitifs from containing a provision such as that referred to by the national court.**

Mertens de Wilmars Bosco Touffait

Due Pescatore Mackenzie Stuart O'Keeffe

Koopmans Everling Chloros Grévisse

Delivered in open court in Luxembourg on 16 February 1982.

P. Heim
Registrar

J. Mertens de Wilmars
President